

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

ERIC T. TOLEN,)	
)	
Petitioner,)	
)	
vs.)	Case No. 4:10-CV-02031-RWS-NAB
)	
DAVE DORMIRE,)	
)	
Respondent.)	

**REPORT AND RECOMMENDATION
ON PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

Presently before the Court is a Motion for Summary Judgment in this habeas corpus action filed by Eric T. Tolen (“Petitioner”).¹ [\[Doc. 28\]](#). Petitioner filed a memorandum in support of the motion. [\[Doc. 29\]](#). Dave Dormire (“Respondent”) filed a memorandum in opposition to the motion. [\[Doc. 30\]](#). Having fully considered the arguments set forth by parties, the undersigned recommends that Petitioner’s Motion for Summary Judgment be denied.

Discussion

On October 26, 2010, Petitioner filed a fifty-four page petition for Writ of Habeas Corpus, alleging four grounds for habeas relief. [\[Doc. 3\]](#). Respondent answered the petition on February 10, 2011. [\[Doc. 15\]](#). Petitioner, in four separate filings on March 24, 2011, filed over 200 pages of argument as a reply to Respondent’s answer. [\[Doc. 23\]](#); [\[Doc. 24\]](#); [\[Doc. 25\]](#); [\[Doc. 26\]](#). The record also includes well over 1,500 pages of exhibits. Before the undersigned could address the merits of the habeas corpus petition, Petitioner filed the present 152 page motion for summary judgment.

¹ This matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1).

In the motion for summary judgment, Petitioner merely re-alleges the same grounds for relief that he alleges in his original habeas corpus petition. Although a party may technically file a motion for summary judgment in a habeas proceeding, *see* Rule 12 of Rules Governing § 2254 Cases, the undersigned finds that Petitioner's Motion for Summary Judgment is duplicative of the actual habeas corpus petition, which the undersigned has yet to completely review. Therefore, the undersigned recommends that Petitioner's Motion for Summary Judgment be denied.

Nothing in this order shall be construed as addressing the merits of the underlying petition for writ of habeas corpus. The undersigned will address the merits of petition in due course.

Conclusion

Based on the above analysis, the undersigned recommends that Petitioner's Motion for Summary Judgment be denied. [\[Doc. 28\]](#).

Accordingly,

IT IS HEREBY RECOMMENDED that Defendants' Motion for Summary Judgment be **DENIED**.

The parties are advised that pursuant 28 U.S.C. § 636(b)(1), they have fourteen days in which to file written objections to this Report and Recommendation, unless an extension of time for good cause is obtained, and that a failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990).

Dated this 16th day of November, 2011.

/s/ Nannette A. Baker
NANNETTE A. BAKER
UNITED STATES MAGISTRATE JUDGE